

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

LORENA CHIVERTON,	)	
	)	CIVIL NO. SX-10-CV-575
v.	)	
	)	ACTION FOR DAMAGES
WORLD FRESH MARKET, LLC d/b/a	)	
PUEBLO SUPERMARKET,	)	JURY TRIAL DEMANDED
	)	
Defendant.	)	

**MEMORANDUM OPINION AND ORDER DENYING MOTION FOR
SUMMARY JUDGMENT**

THIS MATTER is before the Court on Defendant World Fresh Market's Motion for Summary Judgment and Memorandum of Law in Support thereof (Motion), filed January 26, 2015; and Plaintiff Lorena Chiverton's Opposition to Motion for Summary Judgment (Opposition) and accompanying Response to Defendant's Statement of Undisputed Facts (SOF), both filed March 1, 2017. Because there exists a genuine dispute of material fact as to whether the risk of harm to Plaintiff was reasonably foreseeable to Defendant such that Defendant was obligated to take reasonable steps to guard against it, summary judgment is inappropriate and Defendant's Motion will therefore be denied.

Background

Plaintiff's Amended Complaint alleges that on August 20, 2010, while shopping at Defendant's grocery store in Estate Golden Rock, St. Croix, Plaintiff suffered injuries when she slipped on a puddle of water that had leaked from nearby, malfunctioning equipment and accumulated on the floor. Complaint ¶ 4-8. Plaintiff further alleges that this accident resulted from: 1) Defendant's failure properly inspect and maintain its premises, 2) Defendant's failure to properly train its employees to do so, and 3) Defendant's failure to have in place proper policies and procedures to prevent such accidents. *Id.*

Defendant filed its Motion on January 26, 2015, chiefly arguing that summary judgment is appropriate because “the record is void of any evidence that the possessor of land had actual notice or constructive notice of the defective condition,” and there is “no evidence that there was sufficient time for defendant to notice the condition.” Motion, at 5. Defendant also presents the equivalent of an “assumption of risk” argument on the basis that Plaintiff was wearing “dangerous shoes” which Defendant apparently contends were more responsible, if not solely responsible, for causing Plaintiff’s injuries.

Subsequently, Plaintiff filed, and the Court granted, two separate motions pursuant to Federal Rule of Civil Procedure 56(d) seeking more time to conduct discovery before submitting a response to Defendant’s Motion for Summary Judgment. *See* Orders entered June 3, 2016, and November 16, 2016. After conducting further discovery, Plaintiff filed her Opposition, along with her response to Defendant’s Statement of Undisputed Facts, on March 1, 2017.

Legal Standard

“Summary Judgment is a drastic remedy [and] should be granted only when the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact,” and judgment is appropriate as a matter of law. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379 (V.I. 2014) (quoting *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008)). In ruling a motion for summary judgment, the Court must determine whether there exists a dispute as to a material fact, the determination of which will affect the outcome of the action under the applicable law. *Id*; *see also Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 527 (V.I. 2013) (citations and quotations omitted). Such a dispute is genuine if the evidence is such that a reasonable trier of fact could return a verdict for the nonmoving party. *Machado*, 61 V.I. at 391-92. In evaluating the evidence of record, the Court must draw all justifiable inferences

in favor of the nonmoving party, and accept the non-moving party's allegations as true if properly supported by the record. *Id.* at 379. The moving party bears the burden of demonstrating the absence of any genuine issue of material fact. *Martin v. Martin*, 54 V.I. 379, 389 (V.I. 2010). Only if the moving party discharges this initial obligation does the burden shift to the non-moving party to introduce some evidence showing the existence of a genuine issue of material fact. *See Perez*, 59 V.I. at 527-28.

To succeed on a claim of negligence a plaintiff must establish the following elements: 1) defendant owed plaintiff a legal duty of care; 2) defendant breached that duty; 3) and defendant's breach constituted the proximate cause of 4) damages to plaintiff. *Machado*, 61 V.I. at 380. In *Machado*, the Supreme Court of the Virgin Islands eschewed the traditional premises liability framework in which the scope of a landowner's duty to individuals injured on its property was determined by the individual's classification as either an invitee, licensee, or trespasser upon the premises. *Id.* at 385-86. Instead, *Machado* definitively established that "the foreseeability of harm 'is the touchstone of the existence of [a land possessor's] duty of reasonable or ordinary care.'" *Id.* (citing *Perez*, 59 V.I. at 533).

Thus, under *Machado* a possessor of land owes a duty to those individuals on the premises to guard them against the risk of reasonably foreseeable harm. 61 V.I. at 390-92. In turn, the risk of any given harm is reasonably foreseeable where the possessor of land has actual or constructive notice of such risk at the time of the incident. *Id.* at 392-93 (in order to demonstrate that Defendant "breached its duty to take reasonable steps to protect [Plaintiff] against foreseeable harm," Plaintiff "was required to produce evidence that could support a finding that Yacht Haven had actual or constructive notice of a dangerous condition"). Even when it is demonstrated that a defendant did not have actual notice of a dangerous condition, such as by knowledge of previous similar

incidents, “another way that notice of a dangerous condition can be imputed to a land possessor is through evidence that the condition persisted over a long enough period of time that the owner should have become aware of it through the exercise of reasonable care.” *Id.* at 393.

Discussion

In its Motion, Defendant argues that summary judgment is appropriate in this case because “the record is void of any evidence that [Defendant] had actual or constructive notice of the defective condition.” Motion, at 5. Defendant further contends that “Plaintiff never saw any water, has no evidence as to how long the water was on the ground and claims that she did not see any water even though she was seen in the video traversing the general area of the alleged fall.” *Id.* Defendant asserts that “because Plaintiff admits that she never looked at the floor and did not see any water she will have no evidence that there was water on the floor in the area on which she fell for any reasonable period of time,” and therefore “there is no evidence for the jury to use to determine how long the alleged water was on the floor.” *Id.*

However, it is clear from Plaintiff’s Opposition and accompanying exhibits—admittedly with the benefit of an additional two years’ worth of discovery in this matter—that Plaintiff has submitted more than enough evidence to create a genuine dispute of material fact on this issue such that summary judgment is inappropriate. Plaintiff has presented deposition testimony of several employees of Defendant, who were working in the grocery store at the time of Plaintiff’s accident and testified that the meat coolers located near the scene of Plaintiff’s accident were in a general state of disrepair, and frequently leaked creating puddles on the floor nearby. Opposition, at 4, and accompanying exhibits. Further, Plaintiff introduced evidence that those same employees notified management of the ongoing problems with the meat coolers as those problems occurred. *Id.* One employee stated in deposition that the problem occurred with such frequency that

employees of Defendant “normally put paper underneath to absorb the water.” *Id.*

Although there is no evidence that Defendant had prior actual notice of water on the floor at the time and place of Plaintiff’s fall, there is sufficient evidence in the record from which a reasonable trier of fact might infer that Defendant had constructive notice that its meat coolers were in such a state of disrepair as to constitute a risk of reasonably foreseeable harm to its customers. Plaintiff has proffered evidence to establish that Defendant’s meat coolers were over thirty years old at the time of the incident, and that Defendant had previously ordered maintenance work to fix leaking coolers on more than one occasion. *Id.* at 5. From this evidence, even without actual notice of a particular spill or leak that caused Plaintiff’s fall or notice of prior similar incidents, reasonable jurors could infer that Defendant should have known that its thirty year old meat coolers were in need of replacement or, in the alternative, sufficiently regular inspection such that Defendant would be promptly alerted to any leak or condition constituting a risk of harm, in order that it might take reasonable steps to protect customers. A reasonable jury might infer that Defendant’s failure to perform such regular inspections of those coolers constituted a breach of its duty to protect store patrons from harm that was inherent and reasonably foreseeable in the use of those coolers.

Any argument by Defendant that Plaintiff has failed to produce sufficient evidence to establish how long any water was on the floor prior to Plaintiff’s fall is substantially undermined by the fact that Defendant preserved video recording of the area of Plaintiff’s fall for only “62 seconds” immediately preceding the fall. As Defendant was in sole possession of the surveillance video recording of the incident, the burden was on Defendant to preserve the video evidence, including a reasonable period of time before and after the incident. *See Bright v. United Corp.*, 50 V.I. 215, 225-26 (V.I. 2008). Defendant’s failure to preserve relevant evidence, even without an

inference of spoliation, deprives the fact finder of the opportunity to observe the conditions in the area immediately preceding Plaintiff's fall; conditions that may or may not support Defendant's argument that it acted reasonably in discharging its duty to guard patrons against the risk of foreseeable harm. Allowing Defendant to utilize its own failure to preserve critical evidence offensively in an attempt to justify entry of summary judgment against Plaintiff would run counter to the well-established Virgin Islands precedent articulated in *Bright* and its progeny, and would be antithetical to fundamental notions of fairness and justice. The Court discounts any such argument.

Lastly, Defendant's Motion appears to argue that summary judgment is appropriate because Plaintiff has failed to establish that her injuries were proximately caused by water allegedly on the floor rather than by Plaintiff's own negligence in wearing "dangerous shoes," and in failing to notice and appreciate the open and obvious danger presented by water on the floor in front of her. Motion, at 6-7. While at common law, such arguments based on assumption of risk and contributory negligence once stood as a bar to recovery, the Supreme Court of the Virgin Islands has definitively established that under the operative comparative negligence statute governing actions for negligence in the Virgin Islands,¹ questions of assumption of risk or contributory negligence are questions of fact to be submitted to the jury, which bears ultimate responsibility for assigning fault between the parties. *See Machado*, 61 V.I. at 397-98.

Therefore, because Plaintiff has proffered evidence sufficient to demonstrate the existence of genuine disputes as to issues of material fact, including the foreseeability of harm to Plaintiff, actual or constructive notice to Defendant of such risk of harm, and the potential comparative

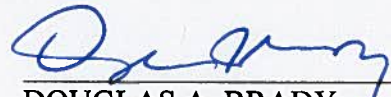
¹ 5 V.I.C. § 1451.

negligence of Plaintiff in casing her own injuries, entry of summary judgment is inappropriate and Defendant's Motion must be denied.

On the basis of the foregoing, it is hereby

ORDERED that Defendant's Motion for Summary Judgment is DENIED.

March 10, 2017


DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Clerk of the Court

By: 

Court Clerk Supervisor
3/13/17

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE:)
) MISC NO. DAB 011/2018
ORDER DESIGNATING CERTAIN)
OPINIONS FOR PUBLICATION.)

TO: Clerk of the Court
Counsel of Record
Law Library / LexisNexis / Westlaw

ORDER

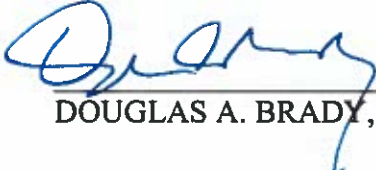
THE PREMISES considered, it is hereby

ORDERED that the following memorandum opinions issued in the below listed cases are hereby designated FOR PUBLICATION.

Pappas v. Hotel on the Cay Time-Sharing Ass'n, Inc., opinion dated April 27, 2015;
Estate of Burnett v. Kazi Foods of the V.I., SX-12-CV-139; opinion dated May 24, 2016;
FirstBank of Puerto Rico v. Prosser, SX-09-CV-520, opinion dated June 22, 2015;
James v. Guardian Insurance Company, SX-10-CV-435, opinion dated July 14, 2015;
Nurse v. Parris, SX-14-CV-011, opinion dated May 3, 2016;
Charles v. Arcos Dorados USVI, Inc., SX-13-CV-336, opinion dated August 18, 2016;
McGary v. J.S. Carambola, LLP, SX-13-CV-289, opinion dated October 7, 2016;
Whyte v. Bockino, SX-15-CV-083, opinion dated January 26, 2017;
Chiverton v. World Fresh Market, LLC, SX-10-CV-575, opinions dated March 10 & 28, 2017;
People v. Melendez, SX-16-RV-003, opinion dated March 22, 2017;
Edwards v. Hess Oil V.I. Corp., SX-15-CV-382, opinion dated June 28, 2017;
In re: Red Dust Claims, SX-15-CV-620, *et seq.*, opinion dated July 7, 2017;
Hamed v. Yusuf, SX-12-CV-370, *et seq.*, opinions dated July 21, 2017 and March 14, 2018;
Toutouyoute v. St. Croix Trading Co., Inc., SX-16-CV-457, opinion dated May 31, 2018.

Finally, it is ORDERED that a copy of this Order be served on counsel for the parties in the above-captioned cases (or the party if proceeding *pro se*), be filed in each of above-captioned matters, and forwarded to the Law Library for distribution to LexisNexis and Westlaw, FORTHWITH.

Dated: October 1, 2018.

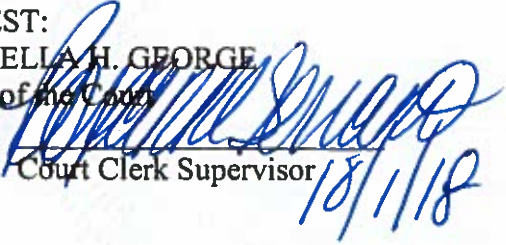

DOUGLAS A. BRADY, JUDGE

ATTEST:

ESTRELLA H. GEORGE

Clerk of the Court

By:


Court Clerk Supervisor 10/1/18